Supreme Court, U.S.
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NO. 91-499

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1991 TERM

IN RE: MONA HANESWORTH,

Debtor.

MONA HANESWORTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents the following questions for review:

1. Whether an estranged spouse consented to the filing of a joint federal income tax return by her estranged husband, without her knowledge or signature, for a year in which she was not required to file an individual federal tax return.

2. Whether the burden of proof as to the issue of consent shifts to the Internal Revenue Service, once the evidence indicated that the estranged spouse did not sign the purported joint tax return.

3. If the burden of proof as to the issue of consent does shift to the Internal Revenue Service, whether the Internal Revenue Service produced

sufficient additional evidence to meet its burden of proof.

LIST OF ALL PARTIES

All parties to the proceeding in this Court, and in the courts below, are identified in the caption.

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SUMMARY OF THE CASE BELOW

1. The United States Bankruptcy Court for the District of Wyoming entered both a Decision and an Order Determining Tax Liability on June 16, 1989.

2. The United States District Court for the District of Wyoming heard oral arguments on the appeal on April 24, 1990, and rendered its Order Affirming Decision of Bankruptcy Court (With Findings) on May 15, 1990.

3. The Court of Appeals for the Tenth Circuit rendered its Order and Judgment, without oral argument, on June 26, 1991, under Rule 36.3 of the Rules of the Tenth Circuit.

4. A Notice of Public Auction Sale of Petitioner's home was issued by the Internal Revenue Service on August 5, 1991, with the sale scheduled for August 23, 1991.

5. On August 22, 1991, the Petitioner filed an Application for Taxpayer Assistance Order to Relieve Hardship with the Internal Revenue Service for the District of Wyoming. The application was orally denied on August 23, 1991.

6. Also on August 22, 1991, the Petitioner filed a Motion for Recall and Stay of Mandate Pending Application to the Supreme Court for Writ of Certiorari with the Tenth Circuit Court of Appeals, and the Court of Appeals entered an Order granting appellant's Motion on August 23, 1991.

STATEMENT OF GROUNDS FOR JURISDICTION IN THIS COURT

1. This Petition seeks review of an Order and Judgment of the Court of Appeals for the Tenth Circuit, which Order was entered on June 26, 1991.

2. There has been no order respecting a rehearing nor any order granting an extension of time within which to file this petition for writ of certiorari.

3. Petitioner believes this Court has jurisdiction to review the Order and Judgment in question by writ of certiorari pursuant to 28 U.S.C. Section 2101.

STATUTES AND REGULATIONS

1. 26 U.S.C. Section 6013. Joint returns of income tax by husband and wife.

(a) **Joint returns.** --- A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions . . .

* * *

(e) **Spouse relieved of liability in certain cases.** ---

(1) **In general.** --- Under regulations prescribed by the Secretary, if ---

(A) a joint return has been made under this section for a taxable year,

(B) on such return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse,

(C) the other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was such substantial understatement, and

(D) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement,

then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent such liability is attributable to such substantial understatement.

* * * *

(3) **Substantial understatement.** --- For purposes of this subsection, the

term "substantial understatement" means any understatement (as defined in Section 6661(b)(2)(A)) which exceeds $500.

2. Treas. Reg. Section 1.6013-1(1980). Joint returns for any taxable year with respect to which a joint return has been filed, separate returns shall not be made by the spouses after the time for filing the return of either has expired.

(a) In general --- * * *

* * *

(2) a joint return of a husband and wife (if not made by an agent of one or both spouses) shall be signed by both spouses. The provisions of paragraph (a)(5) of Section 1.6012-1 relating to returns made by agents, shall apply where one spouse signs a return as agent for the other, or where a third

party signs a return as agents for one or both spouses.

3. Treas. Reg. Section 1.6012-1(1986). Individuals required to made returns of income.

(a) Individual citizen or resident --

* * *

(5) The return of income may be made by an agent if, by reason of disease or injury, the person liable for the making of the return is unable to make it. . . Whenever a return is made by an agent it must be accompanied by a power of attorney (or copy thereof) authorizing him to represent his principal in making, executing, or filing the return. A Form 2848, when properly completed, is sufficient. In addition, where

one spouse is physically unable by reason of disease or injury to sign a joint return, the other spouse may, with the oral consent of the one who is incapacitated, sign the incapacitated spouse's name in the proper place on the return followed by the words, "By _____ Husband (or Wife)", and by the signature of the signing spouse in his own right, provided that a dated statement signed by the spouse who is signing the return is attached to and made a part of the return stating ---

(i) The name of the return being filed,

(ii) The taxable year,

(iii) The reason for the inability of the spouse who

is incapacitated to sign the return, and

(iv) That the spouse who is incapacitated consented to the signing of the return.

The taxpayer and his agent, if any, are responsible for the return as made and incur liability for the penalties provided for erroneous, false or fraudulent returns. * * *

4. 26 U.S.C. Section 6061. Signing of returns and other documents.

Except as otherwise provided by sections 6062 and 6063, any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall be signed in accordance with forms or regulations prescribed by the Secretary.

5. Treas. Reg. Section 1.6061-1(1974). Signing of returns and other documents by individuals.

(a) **Requirement.** Each individual (including a fiduciary) shall sign the income tax return required to be made by him, except that the return may be signed for the taxpayer by an agent who is duly authorized in accordance with paragraph (a)(5) or (b) of Section 1.6012-1 to make such return.

6. 11 U.S.C. Section 505 Determination of tax liability

(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested

before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The court may not so determine ---

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; or

(B) any right of the estate to a tax refund, before the earlier of ---

(i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or

(ii) a determination by such governmental unit of such request.

STATEMENT OF THE CASE

On November 18, 1988, Mona Hanesworth was forced to file for Chapter 7 bankruptcy relief, shortly after the Internal Revenue Service seized her home for non-payment of federal income taxes on an alleged joint tax return for the year 1978. Upon Mrs. Hanesworth's Motion, an evidentiary hearing was held to determine her tax liability in accordance with 11 U.S.C. Section 505.

Mona and Alan Hanesworth were married on August 17, 1956, and lived together as husband and wife until October 24, 1977. Throughout the marriage the Hanesworths filed joint tax returns consistently through 1977, but 1978 was different. It was the first full year of their separation. The estranged couple were barely speaking to each other. For the year 1978, Mr. Hanesworth caused a return

to be prepared showing both his and his estranged wife's names on the first line of the Form 1040. All the income reported on the return was that of Mr. Hanesworth. Mrs. Hanesworth had no income of her own that year which would require her to file an income tax return.

Mr. Hanesworth filed the 1978 tax return showing $29,430.00 of tax due. Mrs. Hanesworth never saw the tax return, either before or at the time of filing, nor did she sign it. Nor did she sign a Form 2848 Power of Attorney for that year; only her estranged husband's name is on the Form 2848, and only he signed it. Mrs. Hanesworth's name, social security number, and the names of their children do appear on the face of the 1978 return. This information was not obtained from Mrs. Hanesworth, but was easily obtained by Mr. Hanesworth just by looking at any prior return the couple had filed.

However, Mrs. Hanesworth did sign and file a joint tax return for 1979 with her estranged husband. In marked contrast to the 1978 return, the 1979 tax return showed a tax due of only $2,148.00, which was paid in full, partially through withholding of Mrs. Hanesworth. Mrs. Hanesworth did not file another tax return with her estranged husband, even though their divorce was not final until February, 1984. In the intervening years of 1981, 1982 and 1983, Mrs. Hanesworth filed separate tax returns.

In 1985, and again in 1986, Mona Hanesworth signed two Internal Revenue Service Form 900 collection waivers, but her only reason for doing so was to save her home, the home which her parents had built and in which she had lived most of her life. A lawyer and Mr. Harry Johnson, the Revenue Officer handling the collection case, told her that the

Internal Revenue Service would seize her home immediately if she did not sign the waivers. She signed the collection waivers because she was told she had no choice. All she really knew was that her signature would save her home. Furthermore, her signing was the natural reaction of any taxpayer who is told she must sign the waiver. However, her signature only provided a brief respite, for in October, 1988, the Internal Revenue Service seized her home, just prior to the expiration of the waiver she signed in 1986.

Throughout the Hanesworths' marriage, Mrs. Hanesworth had little or no knowledge of her husband's business dealings. Until 1979, she had had no income herself which would require the filing of a tax return. For a good portion of this marriage, the couple even maintained separate checking accounts.

It is true that prior to October 1988, Mrs. Hanesworth did not question her liability for these particular taxes, but the failure was because she did not know she could challenge the assessment. A Revenue Officer of the Internal Revenue Service told her she owed the taxes. A lawyer told her she owed them. She accepted both statements, but neither person had ever examined the return upon which the assessment was based. In fact, it is extremely doubtful that anyone ever examined the 1978 return until the issue of Mrs. Hanesworth's liability was raised in the Bankruptcy Court.

It should also be noted that Mrs. Hanesworth was not the only one to wait to challenge her liability. The taxes were self-assessed in 1979; an audit of the 1978 return concluded with an additional assessment of $409.00 in 1981. Yet the

Internal Revenue Service did not file its federal tax lien until March 19, 1987.

The bankruptcy was Mrs. Hanesworth's only avenue to determine whether she was liable for the taxes on the 1978 return. Although another option exists in theory, it was not a viable choice to which Mrs. Hanesworth could avail herself. On her limited income, it was impossible for her to pay over $70,000.00 of taxes, accrued interest, and penalties, and then file a claim for refund.

Nor could Mrs. Hanesworth petition the Tax Court to challenge her liability. Since the tax was shown on the face of the filed return, no notice of deficiency was issued to invoke the jurisdiction of the Tax Court.

Finally, Mrs. Hanesworth could not have filed an amended return as a married person filing separately. The Internal Revenue Service's own Treasury Regulation

Section 1.6013-1(a) prohibits a married person from filing separately, once the Internal Revenue Service has "accepted" a joint return.

ARGUMENT

Presented here are the questions of whether an estranged wife consented to the filing of a joint federal income tax return by her estranged husband, without her knowledge or signature, for a year in which she was not required to file a federal tax return; and, once the evidence indicates that the estranged wife did not sign the purported joint return, whether the burden of proof shifts to the Internal Revenue Service on the issue of consent.

The Petitioner believes this Court should grant certiorari in this instance for these reasons: first, there now exists a clear split of authority among the Circuits on the question of consent; second, this Court has previously held that the presumption of correctness of an Internal Revenue Service assessment does not apply when the government's assessment

is a "naked assessment without any foundation whatsoever . . ."; and third, there are thousands of estranged spouses who need the certain comfort that their spouses cannot file a tax return making them liable to the government without their actual consent, as evidenced by a signature, or clear and convincing evidence that the spouse intended the return be hers.

I. The Decisions of the Courts of Appeal on this Issue are Now in Conflict as a Result of the Decision in the Court Below.

The question at issue was addressed by two Courts of Appeal prior to the decision in the case below. Shea v. Commissioner, 780 F.2d 561 (6th Cir. 1986). O'Connor v. Commissioner, 412 F.2d 304 (2d Cir. 1969). Bauer v. Foley, 404 F.2d 1215 (2d Cir. 1968).

On facts highly similar to this case, the Sixth Circuit found in Shea that a spouse could not be found to have tacitly consented to a tax return merely because she did not file a separate return. In fact, the Sixth Circuit went further and held that "the failure of either party to sign the return, or authorize someone to sign it for petitioner renders it invalid as to the petitioner" and that the "Tax Court was clearly erroneous in determining

that petitioner intended to file this joint return." Shea, at 568.

The Second Circuit has decided similar issues on two separate occasions with different results. In O'Connor v. Commissioner, 412 F.2d 304 (2d Cir. 1969), the Court found the wife had intended to file a joint return, even though the return did not bear her signature, when the return included her separate farm income and expenses. However, in Bauer v. Foley, 404 F.2d 1215, 1220 (2d Cir. 1968), the Court found that the Internal Revenue Service should determine that "the return contains the genuine signatures of both, unless signed by a duly authorized agent, and that neither was made under duress and that both intended that it be filed as the law requires." In Bauer, the wife had no taxable income of her own. In both these cases, the Second Circuit seems to demand

actual consent without specifically using that language.

Both the Second Circuit and the Sixth Circuit recognized that the Code and regulations governing the Internal Revenue Service require that a return shall be signed (26 U.S.C. Section 6061; Treas. Reg. Section 1.6061-1(9174)). A joint return shall be signed by both spouses (Treas. Reg. Section 1.6013-1(1980)).

The same question was presented in the Court below. The Tenth Circuit pointedly found that Mrs. Hanesworth had tacitly consented to the filing of the return as a joint return. The undisputed facts that Mrs. Hanesworth did not sign the return, did not even know the return had been prepared and filed, and that she filed subsequent separate returns was apparently of no legal significance.

II. This Court Has Previously Held That the Presumption of Correctness of an Internal Revenue Service Assessment Does Not Apply When the Government's Assessment is a "Naked Assessment Without Any Foundation Whatsoever."

In United States v. Janis, 428 U.S. 441, 96 S.Ct. 3021, 3026 (1976), this Court found that the Internal Revenue Service is denied the presumption of correctness if the assessment is a "naked" assessment without any foundation whatsoever. (Emphasis in the original.)

The Fifth Circuit recently cited Janis in a case involving an alleged failure to report legal income. Portillo v. Commissioner, 932 F.2d 1128 (5th Cir. 1991). In Portillo the Internal Revenue Service was not allowed to invoke the presumption of correctness as to a Form 1099 sent to it, a good portion of which

the issuer could not substantiate upon further inquiry.

There can be no clearer example of a naked assessment than one made in direct contradiction to the Internal Revenue Code and the Service's own regulations. Internal Revenue Code Section 6061 requires that an individual must sign the return. The limited exceptions to the signing rule are set forth in Treasury Regulation Sections 1.6061-1(1974) and 1.6012-1(a)(5)(1986). Yet, even the exceptions require the signature of an agent on behalf of the nonsigning spouse, with very clear and precise requirements for the signing agent to follow. Not one of the requirements was satisfied on the 1978 return filed by R. Alan Hanesworth. None of the requirements of Treas. Reg. Section 1.6012-1(a)(5) were satisfied on the Form 2848 signed by R. Alan Hanesworth. In fact, the section on the

Form 2848 Power of Attorney for the name of the taxpayer showed only the name of R. Alan Hanesworth.

Throughout this case the Internal Revenue Service has relied, almost totally, upon the presumption of correctness in its determination that Mrs. Hanesworth is liable for the 1978 taxes. The Service also relies upon her earlier failure to challenge the assessment after a revenue officer told her she was liable. This reasoning is circular: "She is liable because she did not argue when we told her she was liable." The Court below accepted this circular reasoning when it noted that she did not object to the assessment until several years after she signed a Collection Waiver in 1985. Even in 1985, the only avenue available to Mrs. Hanesworth to object to her liability for the 1978 taxes was bankruptcy.

After Mrs. Hanesworth signed the first waiver, it was three long years before the Service actually seized her home. For all Mrs. Hanesworth knew, her ex-husband could have paid the deficiency in full in that intervening three years. When her home was seized, Mrs. Hanesworth took immediate action.

As was the situation in the Bauer case, Mrs. Hanesworth at no time had the funds with which to pay the alleged deficiency and sue for a refund.

Although the Second Circuit in O'Connor found that the nonsigning spouse intended the return to be a joint return, it also found that the lack of a signature "shifts to the Government the burden of producing additional evidence on the issue" of consent. O'Connor at 309. Mrs. Hanesworth's after-the-fact conjecture about what she might have done, if she had known about the return at the time it was

filed, can hardly qualify as sufficient additional evidence to prove even tacit intent at the time the return was filed. Actual intent should be the required standard to assess tax liability against a non-signing spouse for that particular tax return.

III. Thousands of Estranged Spouses Need the Certain Comfort that Their Spouses Cannot File a Tax Return Making the Estranged Spouse Liable to the Government Without Actual Consent.

Petitioner believes that a decision in her favor would be of major significance to every estranged, divorcing, or divorced person in the nation. This question arises repeatedly in many forms. For example, the question also arises in situations where an income tax return is filed by one spouse, after the couple divorces, for a tax year prior to the divorce.

As the matter presently stands within the Tenth Circuit, a non-signing spouse will be deemed to have tacitly consented to the filing of an income tax return which merely bears her name and social security number. This result is contrary

to the Internal Revenue Code requirements for a signature on every tax return. It would be helpful for an individual to know definitely that he or she must have given actual consent to the filing of a tax return, at the time of filing, or must have signed the return in accordance with the Code and regulations.

CONCLUSION

For the reasons noted, resolution by this Court of the questions presented is both appropriate and urgent, and the writ of certiorari should be issued.

Dated this 20th day of September, 1991.

Mona Hanesworth,
Petitioner

By: Dennis K. Ridley
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By: _____
Janet L. Tyler

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CERTIFICATE OF SERVICE

We hereby certify that, on the 20th day of September, 1991, a true and accurate copy of the foregoing Petition for Writ of Certiorari was deposited in the United States Mail, postage prepaid, addressed to the following: Solicitor General, Department of Justice, Washington, D.C. 20530; Internal Revenue Service, 308 West 21st Street, Cheyenne, Wyoming 82001; Richard Stacy, United States Attorney, 2120 Capitol Avenue, Room 4002, P.O. Box 668, Cheyenne, Wyoming 82003-0668; Commissioner Lawrence Gibbs, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224; Attorney General, Department of Justice, 10th and Constitution, Washington, D.C. 20530.

Dennis K. Ridley

Janet L. Tyler

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: MONA HANESWORTH, Debtor,	)	
MONA HANESWORTH, Appellant,	)	No. 90-8075 (D.C.No. C89-0261-K) (D. Wyo.)
v.	)	
UNITED STATES OF AMERICA, Appellee.	)	

ORDER AND JUDGMENT*

Before McKAY, SETH, and SEYMOUR, Circuit Judges.

After examining the briefs and appellate record, this panel has

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Debtor Mona Hanesworth appeals from the district court's affirmance of the decision of the bankruptcy court determining debtor liable for unpaid income taxes, interest, and penalties for the year 1978. Debtor's motion to determine tax liability ensued after she filed a Chapter 7 bankruptcy petition in response to the IRS levy and seizure of her home for nonpayment of the 1978 assessment.

The single issue presented for review is whether the 1978 tax return, signed by debtor's husband and the tax preparer, was intended to be a joint return despite the absence of the debtor's signature. Debtor

presents two interrelated arguments in support of her position that the 1978 tax return was not intended to be a joint return: (1) the government did not meet its burden of proving the debtor's intent to file a joint tax return, and (2) the IRS' destruction of the records and reports related to the 1978 tax return precluded the government from meeting its burden of proof.

Debtor and her ex-husband, Alan Hanesworth, were married on August 17, 1956. They were separated on October 24, 1977, and ultimately divorced in February, 1984. The facts in this case point to the maintenance of a legal marriage during 1978, even though the relationship was less than harmonious. Although occupying separate residences, neither party instituted divorce proceedings until several years after the filing of the disputed return. During the period of

time in question, the husband continued to be the sole financial support of the debtor. She remained unemployed outside the home and had no independent income during that year. It is undisputed that the couple filed joint tax returns during the years of their marriage including 1976, 1977, and 1979, even though they were living apart during the latter part of 1977 and during all of 1979.

The determination as to whether the nonsigning spouse intended a joint return is one of fact and must be affirmed unless determined to be clearly erroneous. O'Connor v. Commissioner, 412 F.2d 304, 309 (2d Cir. 1969), cert. denied, 397 U.S. 921 (1970). Generally, "a finding of fact is 'clearly erroneous' if it is without factual support in the record, or if the Appellate Court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been

made." LeMaire ex rel. LeMaire v. United States, 826 F.2d 949, 953 (10th Cir. 1987).

"A husband and wife may make a single return jointly of income taxes," I.R.C. Section 6013(a), if it "shall be signed by both parties." 26 C.F.R. Section 1.6013-1(a)(2). Spouses filing a joint income tax return incur joint and several liability as to any tax deficiencies. I.R.C. Section 6013(d)(3); Tavery v. United States, 897 F.2d 1032, 1034 (10th Cir. 1990). The failure of one spouse to sign the return does not negate the intent of filing a joint return by the nonsigning spouse. Snyder v. Commissioner, 47 T.C.M. (CCH) 667, 669 (1983); Estate of Krock v. Commissioner, 46 T.C.M. (CCH) 1330, 1332 (1983); Frank v. Commissioner, 43 T.C.M. (CCH) 1149, 1155 (1982)(citations omitted); Estate of Campbell v. Commissioner, 56 T.C. 1, 12 (1971).

The commissioner's determination that a tax return is joint is accorded a presumption of correctness. If the evidence indicates that one of the spouses did not sign the return, the commissioner's presumption of correctness is defeated and the burden shifts to the government to present additional evidence of intent. Cassity v. Commissioner, 53 T.C.M. (CCH) 514, 516 (1987); O'Connor v. Commissioner, 412 F.2d at 309. If mutual intent is not apparent on the face of the return, the finder of fact may look to other sources. Wills Corp. v. Commissioner, 28 T.C.M. (CCH) 174, 185 (1969).

Here, a copy of the 1978 income tax return, placed into evidence by the debtor, was marked as "married filing jointly." Debtor's name and social security number appear at the top of the form along with those of her husband.

Debtor, her husband, and the couple's two children are claimed as exemptions. See R. Vol. I, Tab 1 at 35.

The government presented evidence that debtor signed two IRS form 900 waivers of collection, one on January 3, 1985, and the second on August 11, 1986. Addendum to Appellee's Brief, Defendant's Exh. A. Therefore, it can be assumed that, although the exact point at which debtor received notice of the tax assessment is unclear, she was definitely placed on notice at the time she signed the first waiver in 1985. However, there is no evidence that she objected to her liability for the assessment until February, 1989, more than four years later, when she learned that she could not avoid the levy and seizure of her home through her bankruptcy action.

In debtor's original motion to determine tax liability, she claimed

protection pursuant to I.R.C. Section 6013(e),[1] the "innocent spouse" provision. At the time of hearing in the Bankruptcy Court, debtor withdrew this argument in favor of her claim that the 1978 return was not a joint return. Tr. at 3-4. The government argues that because the innocent spouse defense requires the

---

[1] Pursuant to I.R.C. Section 6013(e), a spouse can be relieved of tax liability if:

> (A) a joint return has been made under this section for a taxable year,
>
> (B) on such return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse,
>
> (C) the other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was such substantial understatement, and
>
> (D) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement.

filing of a joint return, by so initially claiming, debtor admitted her joint intent. We do not agree. Parties have been allowed to plead these two defenses in the alternative without incurring the kind of prejudice which the government seeks to impose. See Cassity v. Commissioner, 53 T.C.M. (CCH) at 514; Snyder v. Commissioner, 47 T.C.M. (CCH) at 669; Klayman v. Commissioner, 39 T.C.M. (CCH) 277, 278 (1979). Although not dispositive of intent, debtor's original request for innocent spouse protection, along with her unexplained delay in challenging her liability, leads us to question whether her claim of lack of intent to file a joint return may have been an afterthought born of desperation.

The necessary intent to file a joint tax return can be established by the conduct of the nonsigning spouse rather than the presence or absence of a

signature. Walsh v. United States, 56 A.F.T.R.2d 85-5370, 85-5371 (1985). The debtor testified that her husband handled all of the family's financial affairs, and that she knew very little of his business dealings. Tr. at 9. She further testified that she was in the habit of signing anything he asked her to sign. Tr. at 12. The couple had established a consistent pattern of filing joint tax returns. Debtor signed a joint return for the tax year ending December 31, 1979, the year following the one in dispute, even though she had some independent income during that year and could have filed a separate return. Id. Debtor offered no reason why she would not have signed a joint return for 1978 had she been requested to do so, and in fact, testified that she thought she had to file a joint return with her husband in 1978 because she was not working. Tr. at 11. The fact

that debtor began filing separate returns in 1980 indicates that she was aware of her obligation to file a separate return once she acquired independent taxable income and ceased filing joint returns with her husband.

in Shea v. Commissioner, 780 F.2d 561, 567 (6th Cir. 1986), the Tax Court had set forth factors to be considered in determining intent as, (1) whether a separate return was filed by the nonsigning spouse, (2) whether the nonsigning spouse objected to the joint filing of the return, and (3) whether the parties had established a pattern of joint filings. The Sixth Circuit opined that, while these factors were important, the main focus should not be on "petitioner's intent to file any joint return, but whether she intended to file and be bound by the particular return in question." Id. (emphasis in original). Using these

criteria, the court reversed the Tax Court and decided the wife had not intended to file a joint tax return. However, the facts in Shea are distinguishable from debtor's circumstances. In Shea, the disputed tax return was not signed by either the husband or the wife. It only carried the signature of the tax preparer. The court determined that the wife in Shea never authorized anyone but her husband to sign on her behalf, and the absence of a signature by either party negated the requisite intent. Id. at 568.

Debtor argues that the Tax Court's determination in Snyder is dispositive in this case. in Snyder, the court refused to find a joint return was intended. Snyder v. Commissioner, 47 T.C.M. (CCH) at 670. However, unlike the present case, the wife in Snyder had refused to sign the disputed return when asked to do so. Id. at 669. Also distinguishable is Cassity,

where, under similar facts, the court concluded the wife was not liable because the parties failed to establish a continuous pattern of joint filings, and the wife had demonstrated a propensity to question her husband regarding the need for her signature on various documents. Cassity v. Commissioner, 53 T.C.M. (CCH) at 517.

We are inclined to agree with the district court, that the facts of Frank v. Commissioner, 43 T.C.M. (CCH) 1149 (1982), more closely align with the facts of this case. In Frank, the wife was not employed outside the home, had no income of her own, and was totally uninvolved in her husband's business affairs. Id. at 1150. Debtor argues that Frank is distinguishable in that the husband and wife maintained an intact marriage during the period in question, whereas debtor's marriage was estranged. We do not find

this persuasive in light of the fact that during the year in question, neither debtor nor her husband took any steps to legally dissolve the marriage. Although maintaining separate residences, they continued to represent a financial unit which could benefit from filing a joint return.

Debtor further argues that because the reports and work papers regarding the 1978 return had been destroyed by the IRS, the government was unable to meet its burden of proof as to intent. Appellant's Brief at 28; tr. at 25-27. The cases cited by debtor in support of this argument relate to challenges of the validity and amount of tax assessments, issues never raised by debtor. Debtor never explained the import of these documents to her claim of lack of intent and we fail to see the relevance. Also, it is apparent that the unavailability of

the documents is attributable to debtor's long delay in challenging her liability. Regardless, it appears the destroyed reports and work papers would only be relevant to a challenge of the validity and amount of the assessment and would not, in our opinion, have supported debtor's claim of lack on intent.

Debtor also argues, in her brief, that she did not receive notice of the assessment until she was asked to sign the first form 900 waiver of collection in January, 1985. The record supports this claim as it is void of any additional evidence of notice. Although we question the government's statement that "presumably" debtor received notice of assessment (Appellee's Brief at 12), the issue of adequate or timely notice was never raised until debtor argued it in her opening brief. We, therefore, do not reach this issue. Baker v. Penn Mut. Life

Ins. Co., 788 F.2d 650, 663 (10th Cir. 1986).

Although the bulk of the evidence is circumstantial, it weighs heavily on the side of the government. Debtor's failure to object to her liability until she realized her home was actually in jeopardy, the established pattern of joint filing both before and after the year in question, and debtor's history of acquiescence in her husband's handling of the family's financial affairs, coupled with the facial declarations on the return, lead to the conclusion that debtor tacitly consented to the filing of a joint tax return for 1978.

We therefore conclude that the Bankruptcy Court's determination of tax liability is not clearly erroneous. The parties' respective requests for oral argument are DENIED, and judgment of the

United States District Court for the District of Wyoming is AFFIRMED.

ENTERED FOR THE COURT:

Monroe G. McKay
Circuit Judge

Entered: June 26, 1991.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

In re	)	
	)	
MONA HANESWORTH,	)	
	)	
Debtor,	)	
	)	No. C89-261-K
MONA HANESWORTH,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

ORDER AFFIRMING DECISION OF BANKRUPTCY COURT (WITH FINDINGS)

The above-entitled matter having come on regularly for hearing before the court on appeal from the decision and order of the United States Bankruptcy Court for the District of Wyoming adjudging debtor-appellant liable for unpaid taxes, including penalties and interest, stemming from a joint federal income tax return for the year 1978; appellant appearing by and through her attorney, Janet L. Tyler;

appellee appearing by and through its attorney, William M. Trencher, Tax division, States Department of Justice; and the Court having heard the arguments of counsel and having fully and carefully reviewed and considered said appeal, the briefs and record herein and all matters pertinent thereto, and being fully advised in the premises, FINDS:

This appeal stems from a decision of the Bankruptcy Court finding that the secured portion of a claim of the Internal Revenue Service (IRS) against the debtor's estate was not dischargeable, notwithstanding debtor's contention that the tax return filed for the particular year in question was not a joint return due to the absence of her signature thereon because of marital problems. This court has jurisdiction pursuant to 28 U.S.C. Section 158(a). The facts of this

case are extraordinarily simple and appear from the record as follows.

Alan and Mona Hanesworth were married in 1956. On October 24, 1977, they separated and were finally divorced in 1984. Throughout their marriage, they filed joint returns. For the 1978 tax year, a return marked "married filing joint", reflecting a tax liability of $29,480, was sent to the IRS. Rec. Vol I at 35-36. It was signed only by the husband. During 1977 and 1978, Mona Hanesworth did not work outside the home but depended on Alan Hanesworth, who was involved in several partnerships, to periodically give her money for various household expenses. In 1981 it was determined that the 1978 taxes had been under reported by some $409. The total tax liability remains largely unpaid. In 1985 and 1986, both Alan and Mona Hanesworth signed tax collection waivers

extending the time for payment of the debt. Rec. Vol. III (Dft's Exh. A). With no payment forthcoming, the IRS, on March 18, 1987, filed a notice of federal tax lien for the unpaid balance of the assessment. Rec. Vol. III (Dft's Exh. B). On October 25, 1988, the IRS levied against Mona Hanesworth's residence, property which she had obtained under the divorce decree, pursuant to the lien notice. Mona Hanesworth filed for bankruptcy under Chapter 7 on November 18, 1988. Subsequently, Alan Hanesworth, evidently with no assets, filed for bankruptcy.

An evidentiary hearing was held before the bankruptcy judge on a motion by debtor Mona Hanesworth to determine her tax liability, the debtor contending that she should not be liable for the unpaid taxes because, inter alia, she had been separated from her husband, had maintained

a separate checking account since 1973, and had no knowledge of her husband's income in 1978. By decision entered June 16, 1989, the bankruptcy judge held that Mona Hanesworth intended to file a joint return in 1978 notwithstanding the absence of her signature on the face of the return and that the IRS had a valid claim against her for the 1978 tax liability. An appropriate order was entered on the same date. It is this decision and order that the debtor appeals from.

Although the debtor enumerates four issues on appeal, all essentially go to the central issue of whether the Bankruptcy Court erred in finding an intent to file a joint return in 1978 even though one of the spouses had not signed the return. The issue of debtor's intention relative to whether the tax return was joint is a question of fact. Federbush v. Commissioner of Internal

Revenue, 325 F.2d 1, 2 (2nd Cir. 1963). After reviewing the record as well as the pertinent caselaw in this area, the Court finds that the determination below was not clearly erroneous.

In spite of the general requirement that a joint return need be signed by both spouses, see Treasury Reg. Section 1.6013-1(a)(2), a return may still be regarded as joint even though only one spouse has signed if the intention of the spouses was to file jointly. Cassity v. Commissioner, T.C. Memo. 1987-181 (and cases cited therein).

From the evidence, it appears that Mona Hanesworth did not know much about her husband's business affairs and he never discussed business with her. Rec. Vol. II (Tr. at 9). However, as a matter of course she would sign anything her husband asked her to. Rec. Vol. II (Tr. at 12). While she testified that the tax

collection waivers were signed out of a fear that her home would be seized otherwise, Rec. Vol. II (Tr. at 19), her actions in other respects, as must have appeared to the bankruptcy judge, were anything but consistent with those of an objecting spouse. For over ten years, she did not contest her liability, seemingly acknowledging her responsibility. She knew she would be jointly and severally liable. Rec. Vol. II (Tr. at 17). The couple had filed joint returns in the past, including for the 1976 and 1977 tax years. Moreover, a year after the disputed 1978 return, in spite of living apart as of 1978, the estranged couple filed an uncontested joint return, apparently this time with her signature, for the subsequent tax year 1979, a year in which she had some taxable income. Rec. Vol. II (Tr. at 12). It was not until three years after their separation

that Mona Hanesworth began filing separate returns.

While the ultimate result of all this might arguably be harsh, the fact remains that she knew long ago about her tax liability and could have taken steps sooner to protect her interests and remedy the situation, as did the petitioner in Alford v. Commissioner, T.C. Memo. 1979-31. There is no indication here, unlike the case in Cassity, that the debtor had a "propensity to question the need for her signature." Quite the contrary, as in Riportella v. Commissioner, T.C. Memo. 1981-463, the presence of her signature on prior returns seems to have been "little more than a formal ritual." Under these circumstances, the intent to file a joint return is clear, as it was to the bankruptcy judge.

NOW, THEREFORE, IT IS

ORDERED that the Decision and Order of the Bankruptcy Court appealed from herein be, and the same are, hereby affirmed.

DATED this 11th day of May, 1990.

BY THE COURT:

/s/ Ewing T. Kerr
UNITED STATES
DISTRICT JUDGE

Decision entered May 15, 1990.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF WYOMING

In re	)	
	)	
MONA M.	)	
HANESWORTH,	)	Case No. 88-00929-A
	)	CHAPTER 7
Debtor.	)	

ORDER DETERMINING TAX LIABILITY

THIS MATTER came before the court for hearing on the debtor's Motion to Determine Tax Liability: Dennis K. Ridley and Janet L. Tyler of Dennis K. Ridley & Associates, Cheyenne, Wyoming, appearing for the debtor; William M. Trencher, Tax Division, U.S. Department of Justice, appearing for the United States.

Now, the court having considered the Motion, the Response thereto, the affidavit, the testimony and exhibits, having heard argument of counsel, being fully advised, and in accordance with its simultaneous Decision, it is therefore

ORDERED, ADJUDGED AND DECREED that the debtor Mona M. Hanesworth is liable for the tax, penalty, and interest assessed for the joint federal income tax return of Mona and Alan Hanesworth for the year 1978; and, it is further

ORDERED, that the IRS file an amended proof of claim setting forth the correct amount of said tax liability, including accrued interest and penalties due and owing as of the date of the petition.

DATED this 15th day of June, 1989.

BY THE COURT:

/s/ Harold L. Mai
United States
Bankruptcy Judge

Order entered on June 16, 1989.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF WYOMING

In re	)	
	)	
MONA M.	)	
HANESWORTH,	)	Case No. 88-00929-A
	)	CHAPTER 7
Debtor.	)	

D E C I S I O N

THIS MATTER came before the court for hearing on the debtor's Motion to Determine Tax Liability: Dennis K. Ridley and Janet L. Tyler of Dennis K. Ridley & Associates, Cheyenne, Wyoming, appearing for the debtor; William M. Trencher, Tax Division, U.S. Department of Justice, appearing for the United States.

NOW, the court having considered the Motion, the affidavit, the Response thereto, the testimony and exhibits, having heard argument of counsel, and being fully advised, does hereby find and conclude as follows:

FINDINGS OF FACT

1. Mona Hanesworth married Alan Hanesworth on August 17, 1956. The Hanesworths had two (2) children and were separated on October 24, 1977. They were divorced in February of 1984.

2. Mona Hanesworth did not work outside the home during 1977 or 1978. Alan Hanesworth continued to support the family during the separation in 1978.

3. In 1978, Mona Hanesworth was not involved in Alan Hanesworth's business and did not even know what his income was.

4. In 1977 Mona and Alan Hanesworth filed a joint federal income tax return. In 1979 Mona and Alan Hanesworth filed a joint federal income tax return.

5. In 1978 Mona and Alan Hanesworth intended to, and did, file a joint federal income tax return.

6. Although Mrs. Hanesworth did not sign the 1978 joint tax return, the evidence is clear that she did intend to file a joint return. She testified that, at the time, she believed she had to file a joint tax return for that year.

7. The tax due in 1978 was $29,400. It remains largely unpaid.

8. On or about January 3, 1985, Mona Hanesworth executed a Tax Collection Waiver to extend the collection statute for the 1978 liability. Mrs. Hanesworth signed the waiver at the request of Alan Hanesworth.

9. On or about August 11, 1986, Mona Hanesworth signed a second Tax Collection Waiver for the 1978 liability.

10. On March 19, 1987, the IRS filed a notice of federal tax lien with the Clerk and Recorder of Laramie County, Wyoming. By levy dated October 25, 1988, and Seizure of that date, the States took

possession of real property at 1104 East 22nd Street, Cheyenne, Wyoming, for nonpayment of the 1978 taxes together with interest and penalties.

11. The real property in question is Mrs. Hanesworth's home. This house had been awarded to her in the 1984 divorce and was originally built by her parents.

12. The value of the house is $40,000.

13. Mona Hanesworth filed a voluntary petition for relief under Chapter 7 of the Bankruptcy code on November 18, 1988.

14. The total amount of the debt owed to the IRS for the 1978 tax liability, including accrued interest and penalties as of December 5, 1988, was approximately $69,213.98.

15. Pursuant to 11 U.S.C. Section 506(a) the IRS currently has a secured debt in the amount of $40,000 and an

unsecured claim in the approximate amount of $29,213.98.[1]

16. The IRS has destroyed the original 1978 tax return pursuant to this ordinary record keeping practice.

DISCUSSION AND CONCLUSIONS

The court has jurisdiction over this matter pursuant to 28 U.S.C. Sections 1334 and 157 and 11 U.S.C. Section 505 and Local Rule 905. This Motion to Determine Tax liability is a core proceeding within

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[1] It appears that the IRS impermissibly calculated its claim including interest and penalties through December 5, 1988. Where a lien is undersecured, the interest stops running on the date of the petition. 11 U.S.C. Section 502(b)(2); United Savings Association v. Timbers of Inwood Forest, 108 S.Ct. 626, 631 (1988) (general rule disallows post-petition interest). This Decision uses the $69,213.98 figure as an approximation for illustrative purposes only. Of course, the IRS will need to amend its proof of claim to show the exact amount due on the November 18, 1988 petition date.

the meaning of 28 U.S.C. Section 157(b)(2)(B), (C), (K), and (O).

The debtor originally brought this Motion to Determine Tax Liability pursuant to "innocent spouse" provisions of the Internal Revenue Code. 26 U.S.C. Section 6013(e). However, during the hearing on the matter, the debtor withdrew that claim based upon receipt of the transcript of the account, and instead relies upon the assertion that she did not file a joint tax return for the year 1978, and therefore the liability is not properly assessed.

The court having found that the debtor intended to file the joint tax return for 1978, the joint return is valid even though not signed by both spouses. Estate of Campbell v. Commissioner, 56 T.C. 1, 12-14 (1971). Therefore the IRS has a valid claim against he debtor for the 1978 tax liability.

However, there appears to be some confusion regarding the extent of the IRS lien. The IRS's position is that its lien is for the entire tax debt.

In bankruptcy, "a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured." United States v. Ron Pair Enterprises, Inc., ____ U.S. ____ (February 22, 1989 slip opinion at 3-4).

To the extent that the IRS's lien secures the portion of the claim that exceeds the value of the property securing the claim, it is void. 11 U.S.C. Section 506(c). See United States v. Ron Pair Enterprises, Inc., supra, at 6 n.4 (the subsections of Section 506 "make no distinction between consensual and nonconsensual liens") (dicta).

Thus, pursuant to Section 506, the unsecured portion of the IRS lien becomes

a simple unsecured debt which is dischargeable in bankruptcy.

In accordance with the foregoing, the court determines the debtor was properly assessed for the 1978 tax liability. The court will enter an appropriate order.

DATED this 15th day of June, 1989.

BY THE COURT:

/s/ Harold L. Mai
United States
Bankruptcy Judge

Decision entered June 16, 1991.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: MONA HANESWORTH, Debtor,	)	
MONA HANESWORTH, Appellant, v. UNITED STATES OF AMERICA, Appellee.	)	No. 90-8075

ORDER
filed August 23, 1991

Before SEYMOUR and SETH, Circuit Judges.

This matter comes on for consideration of appellant's motion for recall and stay of mandate in the captioned cause pending timely application to the Supreme Court for certiorari.

Upon consideration whereof, the motion is granted. The mandate issued

August 12, 1991, is recalled and stayed until September 24, 1991, pending certiorari, and, if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until until final disposition by the Supreme Court.

Filed this 23rd day of August, 1991.

Entered For The Court:

/s/ Robert L. Hoecker
Clerk